

No. 20278

In the

United States Court of Appeals  
for the Ninth Circuit

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ELIZABETH G. HERSCHEL, as surviving spouse  
of CHARLES F. HERSCHEL, deceased, and as  
surviving mother of WAYNE ANDREW  
HERSCHEL, deceased; and BRUCE E.

KIERNAN, *Appellants,*  
vs.

MARY ELIZABETH SMITH, Administratrix of  
the Estate of NATHANIEL EAKINS, deceased,  
*Appellee.*

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Appeal from the United States District Court  
for the District of Arizona

**Appellants' Opening Brief**

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### **PREFATORY NOTE**

Appellants were plaintiffs below, and appellee was defendant below. For convenience and uniformity, all parties will be referred to in this brief as they were at the trial court. "T.R." designates the Transcript of Record.

### **JURISDICTION**

The jurisdiction of the District Court is founded on diversity of citizenship and an amount in controversy in excess of \$10,000, exclusive of interest and costs, as alleged in plaintiffs' Amended Complaint (T.R. 7-13).

The final judgment of the District Court was entered on June 9, 1965 (T.R. 41-42). Plaintiffs' Notice of Appeal was filed on June 9, 1965 (T.R. 43-44).

### **STATEMENT OF THE CASE**

The allegations of plaintiffs' Amended Complaint describe an automobile accident involving the persons whose estates are parties to this action (T.R. 7-13).

Charles F. Herschel was driving in an easterly direction late at night in northern Arizona on Highway 66. His grandson, Wayne Herschel, and a friend, Bruce Kiernan, were passengers. Approaching the Herschel vehicle from the opposite direction was a vehicle being driven by Marva White Curtis, who was the agent for her passenger, Nathaniel Eakins. Rita Lazano was also a passenger in this vehicle. Marva White Curtis negligently drove her automobile into the opposing lane of traffic and collided headon with the Herschel vehicle.

In addition to causing her own instantaneous death, the negligence of Marva White Curtis resulted in the deaths of her passenger, Nathaniel Eakins, the driver of the oncoming vehicle, Charles Herschel, and his grandson, Wayne Herschel, all of whom died at the accident scene. The other passenger in the Herschel vehicle, Bruce Kiernan, escaped death but sustained permanently crippling injuries.

Since the collision resulted in the deaths of all the persons legally responsible for it, suit could not, of course, be filed against them directly. Being residents of the State of Ohio, personal representatives were duly appointed for their estates by the Probate Court of Hamilton County, Ohio. Mary Elizabeth Smith was appointed administratrix for the estate of Nathaniel Eakins, deceased, on July 2, 1962; Milton Thurman, Jr. was appointed administrator for the estate of Marva White Curtis on May 20, 1964. These personal representatives were and still are residents of the State of Ohio.

Suit was filed on behalf of the occupants of the Herschel

vehicle in the United States District Court for the District of Arizona against Mary Elizabeth Smith, Administratrix of the Estate of Nathaniel Eakins, deceased; and Milton Thurman, Jr., Administrator of the Estate of Marva White Curtis, deceased (T.R. 1-6). Service of the Alias Summons and Amended Complaint was achieved in each case by the method set out in Rule 4(e), Federal Rules of Civil Procedure, and Rule 4(e)(2), Arizona Rules of Civil Procedure. Copies of the Alias Summons and Amended Complaint were served by registered mail upon Mary Elizabeth Smith, as administratrix for the estate of Nathaniel Eakins (T.R. 15-16), and upon Milton Thurman, Jr., as administrator for the estate of Marva White Curtis (T.R. 18-19). Affidavits of service of process with the registry receipts attached were duly filed with the District Court on February 15, 1965 (T.R. 15-16, 18-19).

Thereafter, Mary Elizabeth Smith, as administratrix for the estate of Nathaniel Eakins, deceased, filed a Motion to Dismiss upon the grounds that this court does not have jurisdiction over her person (T.R. 20). On May 10, 1965, defendant's Motion came on regularly to be heard before the Honorable Judge Muecke in the United States District Court for the District of Arizona. The court ruled in favor of defendant and entered its order dismissing plaintiffs' Amended Complaint as to Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased (T.R. 37-38).

On June 9, 1965, the court entered its Amended Judgment in favor of defendant Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, wherein the court expressly found, in accordance with Rule 54(b), Federal Rules of Civil Procedure, that there was no just cause for delay in rendering final judgment (T.R. 41-42).

On June 9, 1965, plaintiffs filed their Notice of Appeal (T.R. 43-44), Bond for Costs on Appeal (T.R. 45-46), and Designation of Contents of Record on Appeal (T.R. 47-48) and defendant filed her Designation of Additional Parts of

Record on Appeal (T.R. 49). On July 29, 1965, plaintiffs filed their Statement of Points to be Relied Upon (T.R. 54-55).

### **ASSIGNMENTS OF ERROR**

1. The District Court erred in concluding that it did not have jurisdiction over Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased;
2. The District Court erred in granting defendant's motion to dismiss plaintiffs' Amended Complaint as to Mary Elizabeth Smith, administratrix of the estate of Nathaniel Eakins, deceased;
3. The District Court erred in granting judgment to the defendant Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased.

### **ARGUMENT**

The ultimate question on appeal is whether or not the procedure which plaintiffs employed for obtaining jurisdiction over Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, effectively brought the estate within the jurisdiction of the United States District Court for the District of Arizona.

Resolution of this question must begin with an examination of Rule 4 of the Federal Rules of Civil Procedure, which pertains to process in the federal courts. Subsection (e) of this rule establishes the method by which a federal district court may obtain jurisdiction over a person who is neither an inhabitant of the state nor found within the state where the federal district court is held. This subsection provides:

“\* \* \* \* Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.”

In Rule 4(e)(2), Arizona Rules of Civil Procedure, the Arizona Supreme Court has provided a method for obtaining

jurisdiction over persons who are neither inhabitants of nor found within the State of Arizona. One of the avenues by which the extra territorial service of process will result in jurisdiction is as follows:

"When the defendant is a . . . person . . . [who] has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state . . . .

"(a) Registered mail. When the whereabouts of a defendant outside the state is known, the serving party may deposit a copy of the summons and complaint in the post office, registering it with a return receipt requested. Upon return through the post office of the registry receipt, he shall file an affidavit with the court showing the circumstances warranting the utilization of the procedure authorized under Section 4(e) (1); and (a) that a copy of the summons and complaint was dispatched to the party being served; (b) that it was in fact received by the party as evidenced by the attached registry receipt; (c) that the genuine receipt thereof is attached; and (d) the date of the return thereof to the sender . . . ."

Plaintiffs have fulfilled each of the requirements of this rule:

1. Nathaniel Eakins clearly caused an event to occur within the State of Arizona which is the subject matter of this lawsuit. Since he is deceased it is, of course, impossible to serve him directly. Service has therefore been accomplished against Mary Elizabeth Smith, the individual who voluntarily assumed the rights and obligations of collecting the assets and discharging the just debts of the deceased tortfeasor's estate.

2. Plaintiffs deposited a copy of the Alias Summons and Amended Complaint in the post office, addressed it to Mary Elizabeth Smith, 3836 Iona Avenue, Cincinnati, Ohio, and registered it with a return receipt requested.

3. Upon return through the post office of the registered receipt, plaintiffs filed an affidavit with the court showing the

circumstances warranting the utilization of the procedure authorized under section 4(e)(1) and further showing that: (a) a copy of the Alias Summons and Amended Complaint was dispatched to Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased; (b) that it was in fact received by Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, as evidenced by the attached registry receipt; (c) that the genuine registry receipt was attached; and (d) the return of service was received by plaintiffs on February 9, 1965 (T.R. 15-16).

#### **CONCLUSION**

Thus, the United States District Court for the District of Arizona has jurisdiction over Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, since each element of Arizona Rules of Civil Procedure 4(e)(2) has been complied with.

Because of the foregoing, plaintiffs respectfully request this court to reverse the United States District Court's ruling dismissing plaintiffs' Amended Complaint and finding that the procedures employed have effectively brought Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, within the jurisdiction of the United States District Court for the District of Arizona.

Respectfully submitted

MOORE, ROMLEY, KAPLAN, ROBBINS  
& GREEN

By PHILLIP A. ROBBINS  
BRUCE G. DEBES

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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